IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.460 OF 2005

IN

COMPANY APPLICATION NO.338 OF 2004

ALONG WITH

COMPANY APPLICATION (LODGING) NO.709 OF 2005

IN

COMPANY PETITION NO.460 OF 2005

In the matter of Scheme of Compromise/Arrangement between Sharp Industries Limited and its secured, unsecured creditors and equity shareholders.

Sharp Industries Limited,
a Company Incorporated under the
provisions of the Indian Companies
Act, 1956 having its Registered
office at Plot No.6, Survey No.70,
Village Waliv, Vasai (E),
Dist.Thane - 401 208. ...Petitioner

.....

Messrs Jai Chinoy with A.Y.Bookwala & Joydeep Mitra i/b Dewen Dwarkadas & Partners for Petitioner.

Mr.R.D.Soni i/b Ram & Co. for Videocon International Limited.

Mr.J.P.Sen i/b Universal Legal for G.E.Capital Services India.

Mr.K.K.Shroff i/b Bharat Shah & Co. for Caveator

Adhesives & Chemicals.

Ms.Gayatri Singh for Workers.

Messrs C.J.Joy with R.C.Master & M.M.Goswami i/b Dr.T.C.Kaushik for Regional Director.

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CORAM: A.M.KHANWILKAR, J.

NOVEMBER 17, 2005.

ORAL JUDGMENT :

1. The Petitioner has approached this Court to sanction the modified and amended scheme of compromise/arrangement as amended between Sharp Industries Limited-the Petitioner Company and its secured, unsecured, statutory creditors and equity shareholders. It is also prayed that the reduction of the equity share capital in terms of the modified and amended scheme as approved by the special resolution passed by the equity shareholders of the Petitioner Company in their meeting held on 1st June 2005 be confirmed, and that, the order sanctioning the modified and amended scheme of compromise/arrangement be deemed to be an order confirming reduction in capital

within the meaning of Section 102 of the Companies Act, 1956.

2. The Petitioner Company was incorporated on 9th March 1988 under the provisions of Companies Act, 1956. The Certificate of commencement of business was granted by the Registrar of Companies, Maharashtra, Mumbai on 9th March 1988. The authorised share capital of the Petitioner is 1,20,00,000 (One Crore Twenty Lakhs) equity shares of Rs.10/- each. The issued, subscribed and paid up share capital is 1,08,16,382 (One Crore Eight Lakhs Sixteen Thousand Three Hundred Eighty-two) equity shares of Rs.10 each fully paid. The Petitioner is engaged in the business of manufacturing, converting, processing, designing, buying, selling, exporting, importing and/or otherwise dealing in the packaging materials, printing by various printing processes including Rotogravure Printing process way coating and lamination, slitting and sheeting of paper, board, plastic films, polythene, cellophane metal and aluminium foils, Manufacture of bags and pouch making and contract packing and related activities

and other packing material used for packaging industrial consumers, commercial or domestic articles and materials, whether solid or liquid or gaseous. It is stated that the Petitioner's plants operated with high level of capacity utilisation of 82-85% each till December 2000. The Petitioner is an established manufacturer of flexible laminates. It is stated that Petitioner enjoys product approvals and continuous orders from prestigious clients like Hindustan Lever, Proctor & Gamble, Dabur, Castrol, Prefect, etc. It is stated that the capacity utilisation sharply declined from the year 2001 onwards due to recession in the end-user segments and unhealthy competition, which resulted in continuous losses, erosion of working capital of the company, which in turn, affected production. The sales of the Petitioner during the year 2003 and current year 2003-2004 were mainly in the nature of job work sales due to complete erosion of the working capital, and declined from Rs.144 crores for 18 months ended 31st December 2000 (annualized Rs.96 crores) to Rs.53 crores in year ended 31st December 2001. It is stated that with a view to overcome the adverse market situation,

Petitioner introduced new products based on holographic lamination and printing technology, for which, undertook substantial expenditure on product development. This experiment, however, did not materialise, for reasons beyond the control of the Petitioner, which resulted in further financial pressure on the Petitioner incurring heavy losses in the year 2001. It is stated that the losses gradually eroded the available resources, as a result of which, Company entered the vicious cycle of lower sales due to restricted activity of working capital, which had cumulative effect of increase in losses by wiping out the working capital. It is then stated that during the nine months ended September 2003, the sales of the Petitioner comprised mainly from job work that is toll manufacturing for other flexible packaging material manufacturing companies. To sustain itself, Petitioner obtained financial assistance from various banks and financial institutions, but the Petitioner was unable to service its long term debts and was unable to pay interest and instalments of the principal amount due to its creditors. Suffice it to observe that to overcome

the adverse situation, Petitioner thought it advisable and expedient to restructure the debts. The Petitioner Company therefore made reference to the Board of Industrial and Financial Reconstruction (BIFR) on the assertion that its accumulated losses has exceeded its net worth, as on 31st December 2002. The said reference however came to be rejected on 29th December 2003. Against that decision, Petitioner Company has preferred an appeal, which is still pending before the Appellate Authority. In the meantime, the Petitioner Company had discussion with Banks and Financial Institutions for financial restructuring. This effort paid dividends as the Asset Reconstruction Company (India) Limited (ARCIL) registered with Reserve Bank of India under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by their letter dated July 9, 2004 informed the Petitioner that the restructuring proposal submitted by them was under examination and may be considered acceptable, subject to approval from their management. Similarly, ICICI Bank Limited by its letter dated 5th April 2004 and State Bank of India vide letter

dated 12th May 2004 informed the Petitioner that they have absolutely assigned their respective debts to ARCIL. In this backdrop, the Petitioner company propounded the present scheme of compromise/arrangement for restructuring the Petitioner's debts vis-a-vis secured, statutory and unsecured creditors as also shareholders. The Petitioner, anticipating that all the secured lenders may not enter into arrangement with ARCIL under the Act of 2002, proposed a scheme under Sections 391 and 392 of the Companies Act, 1956 to cover all the lenders. The objects to be achieved by the present scheme of compromise are stated as follows:

> "(a) The Scheme would enable the Petitioner Company to match its assets and liabilities in terms of cash flow requirements for servicing the debts. This would also be in the long term interests of all the stakeholders, as this would enable the Petitioner to channalise its energies more effectively in its business and make it financially healthy;
>
> (b) The Scheme in its present form will provide stability of the business operations and improve the profitability of the Company, while ensuring liquidity and solvency of the operations of the Petitioner. The Scheme will also ensure security of employment to over 250

employees with the Petitioner. Without reducing the liabilities of the Petitioner, it is not possible for the Petitioner to carry on its business effectively and profitably;

(c) The Petitioner manufacture multilayered laminated flexible packaging material used for packaging of various consumer products like detergents, shampoo, snack food, biscuits as well as commodities like oil, wheat flour (atta), lubricants oil, pharmaceuticals etc. The end user segments are essentially FMCG producers and market is characterized by decent growth of 5-6% p.a. The market for flexible packaging laminate can be categorized into three broad segments viz.

Segment A : for high quality products for FMCG brands with national and multinational presence.

Segment B : for consumer products of large Indian Companies.

Segment C : for lesser known local brands. This segment is derived more by price sensitivity than quality aspect.

(d) The Petitioner established itself as a leading producer in segments A & B. The Petitioner’s products are well established and have found acceptance by multinationals like Hindustan Lever, Proctor & Gamble, Castrol, Dabu, Perfect etc. The adverse market conditions, which prevailed in the late 1990, have now changed for the better. The Petitioner now expects to be able to make good profit from its operations, which is not possible unless its debt is restructured as proposed in the Scheme;

(e) The FMCG segment for both A & B category has witnessed buoyancy and the selling prices have also firmed up. The

> Petitioner has had long term relationship with many of its customers who are willing to renew the contracts, if the Petitioner is in a position to meet their demands on timely basis. The availability of fresh working capital would enable the Petitioner to capitalize on its core strengths, such as technology capabilities and products approvals with FMCG customers and achieve 75-80% of its capacity utilization in the first year, with its well established products."

3. As the Petitioner Company is optimistic about overcoming the financial difficulty presently encountered on account of adverse market conditions, as it was already on the road of recovery on account of improved market conditions and being a viable corporate entity, capable of recovering itself from such set-backs, if the debts' level were to be reduced, has propounded the present Scheme. Under the Scheme, the paid up value of equity shares shall stand reduced to Rs.54,08,190/- (Rupees Fifty-four Lakhs Eight Thousand One Hundred Ninety) i.e. by 95% i.e. by cancelling Rs.9.5 per equity share from the face value of Rs.10/- each, held by the equity shareholders as on the record date to be fixed by the Board of Directors. The shares shall

thereafter be consolidated and 20 existing equity shares of Rs.0.50 each, shall be merged into one share of Rs.10/- each, as on the effective date and the paid up capital shall stand reduced to Rs.54,08,190/- (Rupees Fifty-four Lakhs Eight Thousand One Hundred Ninety Only) comprising of 5,40,819 (Five Lakhs Forty Thousand Eight Hundred Nineteen) equity shares of Rs.10/- each.

4. The Petitioner took out summons for directions being Company Application No.338 of 2004 before this Court. On the said Application, this Court directed the Petitioner to convene meetings of its equity shareholders, secured creditors, statutory creditors and unsecured creditors on 18th October 2004 for the purpose of considering and if thought fit, for approving, with or without modifications, the Scheme of Compromise/Arrangement between the Petitioner Company and its secured creditors, unsecured creditors, statutory creditors and equity shareholders. On 27th August 2004, an interim order was granted in favour of the Petitioner staying all the criminal prosecution. Against the said decision, four unsecured creditors

applied for vacating the stay so granted. During the pendency of the latter application, meeting of the equity shareholders, unsecured creditors, secured creditors and statutory creditors was held on 18th October 2004, as directed by this Court. The Scheme was approved by requisite majority of the shareholders as well as unsecured creditors. Meeting of the secured creditors and statutory creditors was adjourned due to lack of quorum. The Application filed by the four unsecured creditors for vacating the stay of criminal prosecution was considered by this Court and that prayer was accepted by order dated 4th/5th November 2004. By that order, application preferred by the Petitioner for stay of criminal prosecution came to be dismissed. The Petitioner Company, after obtaining fresh orders, convened a meeting of the secured creditors on 3rd December 2004, where the scheme was approved by requisite majority of the secured creditors with certain amendments. In view of the approvals accorded by the shareholders, secured creditors and unsecured creditors, Petitioner filed Petition to sanction the Scheme of compromise/arrangement in Company Petition No.92 of

2005 connected with Company Application No.338 of 2004. After obtaining fresh orders, meeting of statutory creditors of the Company was convened and held on 10th March 2005 where the amended Scheme was approved by the requisite majority of statutory creditors. Later on, the Company Petition No.92 of 2005 for sanction of the Scheme of Compromise/Arrangement which was admitted, came to be advertised in newspapers on 18th March 2005 and fresh advertisement was published in newspapers on 21st March 2005. During the pendency of the said Petition, Petitioner Company filed application for seeking directions for holding fresh meeting of unsecured creditors. On the said application in Company Petition No.92 of 2005, order was passed on 28th April 2005 directing fresh meeting of unsecured creditors and shareholders on 1st June 2005. The said order, however, was amended by consent of all concerned on 5th May 2005, disposing of Company Petition No.92 of 2005 and the Company Application filed therein. In terms of the consent order dated 5th May 2005, meeting of equity shareholders and unsecured creditors was held on 1st June 2005 under the Chairmanship of Chairman of

the said meeting appointed by this Court. In the meeting of the shareholders, the Scheme was approved by requisite majority of the shareholders. Similarly, the Scheme was approved in the meeting of unsecured creditors by requisite majority of the unsecured creditors. Accordingly, present Petition has been filed by the Petitioner Company for sanction of the Scheme of Compromise/Arrangment.

5. When this Petition was presented in the Registry, it appears, the Registry refused to entertain the same on the ground that earlier Company Petition No.92 of 2005 has already been disposed of. This aspect was considered by me on 1st July 2005, by which order, the Registry was directed to accept the Company Petition, leaving the question open about the maintainability thereof, to be decided if the occasion arises. Accordingly, present Petition has been lodged and registered.

6. In response to this Petition, reply affidavits have been filed on behalf of intervenor G.E.Capital Services India by Shri Kapil Singhal,

Vice President, Risk Management of the said Intervenor. Another affidavit has been filed on behalf of intervenor Videocon International Limited by Mr.Raphael Thomas, Legal Manager of the said intervenor. Both these affidavits have been filed to oppose the present Petition for diverse reasons referred to in the said affidavits. Affidavit of Shri V.Sreenivasa Rao, Regional Director, Western Region, Ministry of Company Affairs, has been filed, which mentions that the proposed Scheme has been examined and it is found that it is not prejudicial to the interest of creditors and shareholders, for which reason, appropriate orders may be passed.

7. Ordinarily, as the Scheme has been approved by requisite majority of the creditors and shareholders and as all formalities have been complied with, the Petition ought to have succeeded. However, this Court is called upon to consider the challenge set-up at the instance of the intervenors referred to above. Besides the above-named intervenors, who have filed reply affidavits in this Court, appearance was made on

behalf of Caveators Adhesives and Chemicals as well as Workmen Union to oppose the present Petition. Arguments canvassed on behalf of Counsel appearing for the respective parties have been considered. It may be mentioned that during the course of arguments, no argument was canvassed on the point of maintainability of the present Petition. In that sense, I will have to consider the merits of the objections raised on behalf of the intervenors and the workmen union. At the outset, it needs to be mentioned that although appearance was made on behalf of workmen union, and objection was raised with regard to certain clauses, which makes reference to the workers, the Counsel appearing for the Petitioner Company made it amply clear that the Scheme was in no way concerned with the workers. In that, it was not related to any rights and obligations of the workers at all. The position of the Petitioner Company has been placed on record by affidavit dated 17th August 2005 making it plainly clear that no direction is sought, which would in any way, affect the interest of the workers. Inspite of such a stand taken by the Petitioner Company, and although the Counsel for the workmen

union, during the course of arguments, submitted that in that situation, the workmen union will have no objection to the proposed scheme, written submissions have been filed on behalf of workmen union registering objections to clauses 5(b), 5(c), 5(f) and 5(h) of the Scheme. I shall deal with this aspect a little later.

8. As mentioned earlier, the above-named intervenors have filed their reply affidavits objecting to the proposed scheme and the present Petition for diverse reasons stated in the said affidavits. However, during the course of arguments, the Counsel appearing for the respective intervenors have addressed the Court only on the points, to which, I shall presently advert to.

9. It may be noted that the proposed scheme is opposed only at the instance of unsecured creditors. No objection has been registered on behalf of shareholders, secured creditors and statutory creditors. Insofar as unsecured creditors as a class is concerned, in the meeting convened on 1st June 2005, from the Chairman’s

report, it is noted that point was raised by the representative of Videocon International Limited and no other unsecured creditor. The report plainly records that no other unsecured creditor present at the meeting raised any query to the proposed Scheme. Insofar as Videocon International Limited is concerned, its representative drew attention of the Chairman on the following issues:

(1) That they were not sure of the amount in the Company's record in respect of their outstanding, which as per the consent terms, was Rs.6,00,00,000/- (Rupees Six Crores).

(2) The notice convening the meeting was received by them very late and was not as per the directions of the High Court.

(3) The list of all the creditors has not been provided to them.

. All the three objections have been duly

considered by the Chairman. All the three issues raised on behalf of Videocon International Limited have been duly considered and opinion recorded by the Chairman in Para 12 of the report. At this stage, it would be appropriate to note that the Chairman of the meeting dated 1st June 2005 appointed by this Court under order dated 5th May 2005 was Shri S.M.Pradhan of M/s.S.M.Pradhan & Company, Chartered Accountants. As he was known to me, at the beginning of the hearing, Counsel appearing for the parties were informed, to which, all the Counsel submitted that they had no objection if I proceeded with the hearing, as none of them were going to make submissions suggesting bias or malafide against the Chairman as such. It was submitted that the correctness of the recording of facts in the report of the Chairman were not in issue at all. But one of the ground would be that the Chairman has not resorted to proper procedure in terms of the orders of this Court. It is in this backdrop, I proceeded with the hearing of the case, as Counsel appearing for the respective parties, on instructions, agreed in that behalf.

10. The sum and substance of the objections raised by the intervenors appearing through Counsel during the course of arguments are as follows:

. That this Court being Company Court has no jurisdiction to entertain the present Petition in view of the bar contained in Section 32 read with Section 26 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'SICA'). It is stated that as reference in respect of the Petitioner Company is pending before the BIFR, this Court will have no jurisdiction to entertain the present proceedings. To support this submission, reliance is placed on the decision of the Andhra Pradesh High Court reported in **1996 CC (Vol. 87) 22 in the case of K.Sitarama Raju vs. Board for Industrial & Financial Reconstruction & Ors.** It was then contended that assuming that even present remedy is available to the Petitioner Company, as the same is not inconsistent with the proceedings pending before the BIFR, in that case, as two remedies are available to the Petitioner, the Petitioner ought to elect one of them. It was then contended that

order passed by Justice S.U.Kamdar dated 5th May 2005 has not been complied with. This is so, because what was placed for consideration in the meeting was only the amendments to the Scheme and not the original Scheme. Besides, the Chairman has failed to consider the objections raised at the meeting in respect of the original scheme and in particular, with regard to the dispute regarding amount to be paid to the respective creditors as claimed by the said creditors.

11. It was then contended that the Scheme as propounded is unreasonable, unjust, unconscionable and unimplementable. This is so, because if the Petitioner Company was to come out of BIFR, serious prejudice would be caused to the concerned creditors, as the creditors such as the intervenors who are possessed of decree passed by the Court which provides for far higher liability of the Petitioner Company towards decretal amount will be denuded of that claim. Further, the process of repayment provided for in the Scheme unjustly slices down the claim of the creditor to principal amount as on the cutoff date. The provision for

waiver of interest accrued and accruable is not only prejudicial but unjust and conscionable. Besides, it is argued that the Scheme as propounded, far from being conscionable, is unimplementable, inasmuch as the repayment provided under the Scheme envisages situation of surplus claim than the cap of Rs.1075 lakhs provided under the Scheme. The surplus amount will have to be rolled over to the next year and there is no guarantee that at the end of the 8th year, the entire principal amount would be offered and paid to the creditors, even though the claim of the unsecured creditors have been pegged down to principal amount due on the cutoff date. Moreover, no default clause has been provided in the proposed scheme insofar as unsecured creditors are concerned. It is also argued that provision is only made regarding upward cap and no minimum payment is assured to the unsecured creditors. It is then contended that no details or flow chart regarding provision of available funds has been disclosed by the Petitioner Company. From the figures which are available from record, it is seen, contends learned Counsel, that the liability

of payment to secured creditors would be in excess of inflow of income. If it is so, no payment will be ever received by the unsecured creditors. It is contended that it is common ground that the networth of the Petitioner Company has eroded and if it is so, the Scheme will not be viable and cannot be implementable at all. It is contended that the Scheme is against public policy as the real purpose of the scheme is to absolve the guarantors and directors of the criminal liability. In other words, the main purpose of the Scheme is of stifling of criminal actions pending against the Petitioner Company and its Directors. It is contended that the options provided in the proposed Scheme is nothing but sham, bogus, unfair and unconscionable. In that, Option No.I makes no provision for commitment to pay the entire principal amount, though it provides for repayment spread over in eight years commencing from the second year with 1st year to be observed as moratorium period, insofar as the unsecured creditors are concerned. The Option No.I provides that initial instalment is paltry amount and the later is substantial; but no specific date is

provided in the Scheme so as to obligate the Petitioner Company to discharge its liability before that date. Nor the scheme provides for any outer period for final payment in case of roll over of the surplus claim. It is contended that Option No.II is very bogus. This is so because there is absolutely no assurance about repayment and that, the principal amount due and payable on the cutoff date will be pegged down with obligation on the concerned unsecured creditor to continue to do business with the Petitioner company and receive payment only of the future transactions. It is submitted that there is absolutely no basis specified in the scheme as to why the claim amount has been reduced to only principal amount.

12. It is then contended that the true and correct accounts has not been placed on record by the Petitioner Company. The claim as per the record of the Petitioner Company refers only to principal amount and no reference is made to the interest component which was otherwise due and payable to the concerned unsecured creditors in terms of the undertaking given by the guarantors or

the decree passed by the Court. It is argued that if the actual amounts receivable by the unsecured creditors is to be reckoned, it would be obvious that the Scheme has not received approval of requisite majority. It is then contended that the primary purpose of introducing the present Scheme was only to absolve the guarantors and the directors of the Company of criminal liability. It is submitted that it is well settled position that this Court while exercising powers under Section 391(6) and 392 has no jurisdiction to pass orders in respect of pending criminal action or interdict the pending criminal action against the directors of the Petitioner company. Reliance is placed on the decisions reported in **1999 (1) LJ 288 (NOC) of the Bombay High Court in Criminal Application No.2517 of 1998, 1977 CC (Vol.47) 242 (Bombay High Court) in the case of State of Tamil Nadu vs. Uma Investments Pvt.Ltd., 2000 (1) CC (Vol.105) 643 in the case of D.K.Kapur vs. Reserve Bank of India & Ors. (Delhi High Court), 2001 CC (Vol.103) 666 in the case of Bombay Leasing Co.Pvt.Ltd. vs. Gresoil (India) Ltd. (Bombay High Court)** to buttress this submission. It is then contended

that the Petitioner Company does not deserve any indulgence on account of its conduct inasmuch as the balance-sheet does not disclose the dues of Videocon International Limited, one of the intervenor. The balance-sheet makes no reference to the decree amount payable to the said unsecured creditor. On this count also, the scheme ought to be disapproved.

13. It is then contended that insofar as Videocon International Limited is concerned, it was a separate class of unsecured creditors. Firstly, because they were Judgment Creditors and their claim has already been adjudicated by Court of competent jurisdiction. Secondly, because the proposed scheme mainly refers to such unsecured creditors who are expected to have continued transaction with the Petitioner company; whereas, Videocon International Limited had only one time transaction with the Petitioner company. In that sense, they were separate class or subclass of unsecured creditors, for which, separate meeting ought to have been convened and their interest ought to have been considered independently.

Reliance was placed on the decision of the Madras High Court in the case of **D.A.Swamy & Ors. vs. India Meters Ltd. reported in 1994 CC (Vol.79) 27** as well as **Miheer H.Mafatlal vs. Mafatlal Industries Ltd. reported in AIR 1997 SC 506**.

14. Besides the above decisions, Counsel for the intervenors have placed reliance on other decisions which generally deal with the scope of enquiry to be undertaken by the Company Judge in exercise of powers under Section 391 of the Act. The same are **AIR 1962 Gujarat 305 in Re Sidhpur Mills Co.Ltd., (1967) II CLJ 16 in the case of Official Liquidators vs. Dr.Shankar Vishnu Marathe & Ors. (Bombay High Court), 1984 CC (Vol.55) 241 in the case of Ipco Paper Mills Ltd., In re. (Bombay High Court), AIR 1997 SC 506 in the case of Miheer H.Mafatlal vs. Mafatlal Industries Ltd.** Reliance was also placed on **AIR 1970 SC 1973 in the case of Punjab National Bank Ltd.** to contend that the liability of surety is co-extensive with the principal. Relying on the exposition in this decision, it was contended that the guarantors will be nevertheless liable for legal action.

15. Reverting to the first objection taken on behalf of the intervenors that pendency of BIFR proceedings would constitute bar for entertaining the present proceedings. In my opinion, this objection will have to be only stated to be rejected. Counsel for the Petitioner has rightly placed reliance on the unreported decision of the Single Judge of our High Court in the case of **National Organic Chemical Industries Ltd. Vs. Nocil Employees Union in Company Petition No.104 of 2005** and connected cases decided on 8th June 2005. It will be useful to refer to the relevant extract in Para 6 of the Judgment, which observes thus:

> "6. ..... I find that on a plain and simple reading of section 22 of the Act it is clear that the suspension of legal proceedings is only in respect of winding up of the industrial company or for execution or attachment of any of the properties of the industrial company for appointment of the receiver. In so far as the guarantors are concerned, the limited protection is granted that is no suit for recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loan granted to the industrial company shall lie. <u>In my view on a plain and simple reading of section 22 the law did not contemplate the suspension of any</u>

> proceedings under section 391 to 394 of the Companies Act, 1956. In view thereof, there is no question of the proceedings being suspended by virtue of section 22 of the Act. Similarly, the provisions of section 26 of the Act also have no application in the present case because the provisions of section 26 apply only when order is passed or proposal is made under the said Act which becomes appealable then except as provided in the said Act no Civil Court shall have jurisdiction in respect of those matters which are to be decided by appellate authority or the Board which is empowered under the Act to determine the said issues and no injunction can be granted by any Court in respect of any action taken under the provisions of the said statute. In view thereof, the provisions of section 26 also have equally no application." (emphasis supplied).

. In para 7, while considering the effect of Section 32 of the SICA, this Court went on to observe thus:

> "7. ..... If the provisions of section 391 to 394 of the Companies Act are inconsistent with the provisions of sections 15 to 19 of SICA then in that event by virtue of section 32 of the SICA the said provisions will have an overriding effect and shall prevail notwithstanding anything inconsistent under the provisions of section 391 to 394 of the Companies Act. In my opinion the answer to this question lies in the fact whether there is any inconsistency between the said provisions of section 32 and the provisions of section 391 and 394 of the Act which are the relevant provisions of

the Act....."

. Again in Paragraph 8 of the said Judgment, the Court observed thus:

> "Mr.Chagla, the learned counsel for the petitioner has contended that there is no inconsistency between the aforesaid two provisions. He has drawn my attention to the statement and objects and reasons of SICA to indicate that the whole idea to introduce the provisions of SICA is to make the company financially viable and independent. He has contended that the provisions providing for merger and demerger of the companies under sections 391 and 394 of the Companies Act also similarly has the same object of making the company viable and more efficient. Thus, he has contended that the provisions of both the statutes are supplemental to each other and not inconsistent therewith and, therefore, this Court would have power to sanction the scheme under section 391 and 394 of the Companies Act irrespective of the provisions of section 32 of SICA. I have considered the aforesaid contention and I find considerable substance and merit therein. The provisions of section 15 to 19 of the Act is a scheme where a company which has become sick can register itself with the BIFR which is vested with the power under the provisions of the said Act which shall thereafter after making enquiry may provide for package for rehabilitation of the company and/or make the company viable so that the business of the company can continue. The provisions of section 391 to 394 of the Companies Act, 1956 also similarly provide for rearrangement of the company's business by way of granting amalgamation, demerger and/or by

> sanctioning of the scheme of compromise which also has very same purpose and object to revive and/or make the company more viable and efficient. The provisions of the Act though provide for different methods of doing so, they are not inconsistent with each others. Apart therefrom, I find that the provisions of SICA operate in a slightly different sphere i.e. the case where the net worth of the company has become negative. Whereas the provisions of section 391 to 394 have no such requirement as condition precedent and this provision can even operate in cases where the companies are doing quite well and are seeking to rearrange its business for the efficient management or better business prospects and thus seeks to amalgamate or demerge its business operation of the company. In my view, since there is no inconsistency between the provisions of section 32 of the SICA and the provisions of section 391 and 394 of the Companies Act, there is no question of the provisions of section 32 of the SICA being made applicable to the present case. In my view, therefore the Court has power and jurisdiction to grant sanction of the scheme under section 391 and 394 of the Companies Act, 1956. In view thereof, I make the present petition absolute in terms of prayer clauses (a) to (d)." (emphasis supplied)

16. I am in agreement with the view expressed by Justice S.U.Kamdar in the above decision. To get over this position, Counsel for the intervenors had placed reliance on the decision in the case of **K.Sitarama Raju (Supra)**, wherein, it is observed that as soon as the reference under Section 15 is

made to the BIFR, the BIFR is seized of the matter and in that case by virtue of Section 32 of SICA, the provisions of that Act would prevail notwithstanding anything contained in the Companies Act, 1956. In my opinion, this decision is of no avail to the intervenors. In the first place, the limited question that was considered by the Andhra Pradesh High Court in exercise of writ jurisdiction was: whether the BIFR has the power to restrain the company from effecting any change in the composition of the Board of Directors, including top managerial personnel pending decision on the question of rehabilitation of the Company. The statement of law occurring at Page 31 placitum (H) of the said decision as referred to above will, therefore, have to be considered in that limited perspective. In any case, I would prefer to agree with the view expressed by Justice S.U.Kamdar which is the correct statement of law. Viewed in this perspective, the objection that this Court has no jurisdiction to entertain the present proceedings in view of the pendency of the BIFR reference will have to be rejected. Anticipating this situation, perhaps, Counsel for the intervenors would then

argue that even if the two proceedings were to be held as independent proceedings, even in that case, the present Petition will have to be rejected unless the Petitioner were to elect one of the available two remedies. There is no substance even in this objection. The question of election of remedy would arise when both the remedies provide for same relief. That is not the case on hand. Besides, as mentioned by Justice S.U.Kamdar, the scheme of two enactments operate in different spheres, though not inconsistent with each other. If it is so, the question of electing one of the two remedy does not arise.

17. The next argument canvassed on behalf of the intervenors is that the order of Justice S.U.Kamdar dated 5th May 2005 has not been complied with in its letter and spirit. There is no substance even in this objection. The first contention in support of this objection was that what was placed for consideration in the meeting held pursuant to the order of this Court was only amended scheme and not the original scheme. Reliance was placed on subclause (6) of the order

dated 5th May 2005, which provides that all the creditors will be entitled to raise all objections either to the original scheme or proposed amendment to the scheme and the same will be taken into consideration in the meeting. This argument, however, is devoid of any substance. The same can be answered straightaway by referring to the report of the Chairman of the meeting. On reading the said report as a whole, it clearly indicates to the contrary. Inasmuch as, what was placed for consideration was not only the amended scheme, but the original scheme as amended. For para 7 of the report mentions that the Scheme of Compromise/Arrangement was read out and explained by the Chairman to the unsecured creditors present at the meeting. It then mentions that it was clarified that the meeting was held in respect of unsecured creditors. In Para 8, it is mentioned that attention of the unsecured creditors present, was also drawn to the fact that pursuant to the order of this Court dated 27th August 2004, a scheme of compromise/arrangement was circulated to the unsecured creditors and the same was approved by the unsecured creditors in the meeting held on

18th October 2004. However, the said scheme was subsequently amended by the secured creditors to some extent and some issues/clarification was sought by some of the unsecured creditors during the proceedings before the Hon'ble High Court and in order to clarify such issues, the scheme was amended and recirculated to all the unsecured creditors and accordingly, the said scheme stands amended to that extent. The report then states that since the scheme was amended, the Hon'ble High Court thought it fit to convene a fresh meeting of the unsecured creditors and pursuant to which directions, the meeting of unsecured creditors was convened to consider the scheme of compromise/arrangement of the Petitioner Company. Therefore, it is not possible to accept the argument that only the amended scheme was placed for consideration of the unsecured creditors; whereas, all the aspects including arising out of the amendment of the original scheme were considered by the unsecured creditors in the said meeting. Besides, none of the unsecured creditors present, raised any point of order at the meeting, on the lines of the objection now sought to be

raised for the first time before this Court. It is too much to assume that the unsecured creditors present, have not taken an informed decision in the context of the original scheme and the amendment introduced to that scheme which has been eventually accepted by requisite majority. Accordingly, I find no substance in this objection.

18. The next objection on behalf of the intervenors is that, all the objections raised on behalf of the unsecured creditors present at the meeting have not been considered by the Chairman, in particular, the controversy regarding the amount payable by the company to the respective unsecured creditor. Once again, there is no substance in this submission. Indeed, under the consent order dated 5th May 2005, by virtue of Clause (10) thereof, the Chairman of the meeting was obliged to determine value of debt or number of shares of each shareholder or of each unsecured creditor at the meeting and his decision was to be final. However, what is glossed over by the Counsel for the intervenors is that none of the unsecured creditor contested the value of debt or number of shares

appearing in the records of the Company against their respective names, at the meeting. If no query or objection was raised in the meeting, it is too late in the day to complain that the Chairman failed to discharge his obligation under Clause (10) of order dated 5th May 2005. Counsel for the intervenors would, however, contend that the unsecured creditors had noted the amount of value of debt on their respective ballots, as was payable to them and therefore, the Chairman was obliged to determine the correct value for the purpose of the meeting, which has not been done. There is no substance even in this submission. Firstly, merely writing some figure on the ballot was not enough. Besides, the value claimed by the intervenors as noted on the ballot by the respective unsecured creditor was in relation to amount which included interest component. Whereas, the proposed Scheme is in relation to the principal dues of the concerned unsecured creditor as on the cutoff date. As mentioned earlier, it is not open to the intervenors to complain that the Chairman has not determined the correct value of debt for the purpose of the meeting. Such objection was not

raised so as to require the chairman to adjudicate the same. At best, it can be said that an issue was raised on behalf of Videocon International Limited, but that was not raising dispute with regard to the value of debt. Instead, only query was put to the Chairman as to what is the (principal) amount shown in the Company's record - as according to the Consent Terms, it ought to be Rs.6,00,00,000/- (Rupees Six Crores). In response to the said query, the Chairman verified the position and accepted the stand of Videocon International Limited that the (principal) amount outstanding in respect of Company as on the cutoff date has been shown in the records of the Company as Rs.6,00,00,000/- (Rupees Six Crores). In that sense, there was no dispute about the (principal) amount that was required to be considered by the Chairman. Be that as it may, the proposed Scheme clearly confines the claim with regard to the principal dues on the relevant date. The scheme provides for settlement/compromise in respect of the amount as stated in the proposed scheme. The Chairman of the meeting has also adverted to this position in his report. The record maintained by

the Company is in conformity with the principal amount outstanding in the record of the Company against the name of the respective unsecured creditors on the relevant date. None of the intervenors have contested the figure of principal amount on the cutoff date. The grievance, however, is that reference ought to have been made even to the interest component which was also the outstanding claim of the concerned unsecured creditors. However, that is not the scope of the Scheme. Whereas, the Scheme attempts to reduce the debt liability by pegging down the amount of dues (principal amount) to be paid to the creditors as on the cutoff date. The Chairman of the meeting has ascertained the position on the basis of record maintained by the Company and proceeded accordingly. No fault can be found with the said approach of the Chairman. To reassure myself, I called upon the Petitioner Company to state on affidavit that the amount of all the creditors referred to in the record of the Company uniformly mentions only the principal amount payable by the Petitioner company to the concerned creditors as on the cutoff date. The Petitioner Company has filed

affidavit of Mr.Hasmukh Seth, Chairman, sworn on 16th November 2005, setting out this position. Suffice it to observe that there is no substance in the grievance of the intervenors that the claim of the creditors has not been determined by the Chairman of the meeting in terms of the obligation arising under the order dated 5th May 2005, much less, any manifest error has been committed in that behalf.

19. It was next contended that true and correct accounts were not placed on record and the reference in the record of the company is only to the principal amount. It was also contended that if the true and correct outstanding amount was to be reckoned so as to include the interest component, then it would necessarily follow that the scheme has not been approved by requisite majority. There is no substance even in this objection. As mentioned earlier, the scope of the scheme is to peg down the amounts to the principal amount payable to the respective creditors as on the cutoff date. The true and correct position of the principal amount due and payable has been

placed on record. The argument that if the interest component was to be reckoned, it would follow that the Scheme has not been approved by requisite majority, clearly overlooks the factual position that the value of the debt considered by the Chairman of the meeting and in my view rightly, of all the unsecured creditors is only of principal amount as on the cutoff date. If the benefit of interest was to be given to the intervenors, similar provision will have to be made in respect of other unsecured creditors, who have voted in favour of the scheme, in which case, the value of their debt will be proportionately increased, thereby maintaining the percentage of requisite majority in favour of the Scheme. At any rate, the submission is clearly contrary to the proposed scheme, for which reason, the same is devoid of merits.

20. Another argument canvassed on behalf of the intervenors is that the Petition should be rejected due to the conduct of the Petitioner Company, inasmuch as the balance-sheet does not disclose the dues of Videocon International Limited

nor does it make reference to the decretal amount payable by the Company to the said Creditor. There is no substance in this submission. As mentioned earlier, the outstanding dues of the unsecured creditors is clearly noted in the records of the Company. The principal outstanding dues of the respective creditors is clearly noted in the records of the Company and which is part of the record. The fact that decree has been passed against the Petitioner Company and in favour of Videocon International Limited, is of no avail for considering the scheme as propounded and non-mention whereof, would not result in any irregularity warranting disapproval of the scheme. For the purpose of the scheme, the information required was the principal outstanding dues of the respective creditors on the relevant date, which is already mentioned in the records of the company as noted earlier. Hence, there is no substance even in this submission.

21. It was then contended on behalf of Videocon International Limited that they were a different class of unsecured creditors; they were

subclass of unsecured creditors. Firstly, because decree has been passed by Court of competent jurisdiction in their favour and against the Petitioner company. Secondly, because they had only one time transaction with the Petitioner Company and cannot be equated with other unsecured creditors, who will have continued business with the Petitioner Company. Both these contentions do not commend to me. Insofar as the former objection is concerned, it is well settled that merely because decree has been passed in favour of the creditor, he would not constitute different class of unsecured creditor. This position is fortified from the purport of Section 390(c) of the Act which provides that unsecured creditors who may have filed suits or obtained decrees shall be "deemed to be" of the same class as other unsecured creditors. There is also authority to support this position, reported in **AIR (29) 1942 Cal.442 in the case of Haricharan Karanjai vs. Ulipur Bank.** Insofar as the latter submission is concerned, the fact that Videocon International Limited had only one time transaction with the Petitioner, cannot be the basis to treat them as separate class or subclass

of the unsecured creditors. Counsel for the said intervenor would, however, place reliance on the decision of the Madras High Court in **D.A.Swamy (supra)** wherein it is observed that broadly speaking, a group of persons would constitute one class when it is shown that they have conveyed all interest and their claims are capable of being ascertained by any common system of valuation. It is then observed that the group styled as a class should, ordinarily, be homogeneous and must have commonality of interest and the compromise offered to them must be identical. The exposition in this decision is of no avail to the intervenor. It will be useful to advert to Para 38 of the decision of the Apex Court in the case of **Miheer H.Mafatlal (supra)**, wherein, it is observed that where a compromise or arrangement is proposed between a company and its members or any class of them a meeting of such members or class of them has to be convened. It is then observed that this clearly presupposes that if the Scheme of Arrangement or Compromise is offered to the members as a class and no separate Scheme is offered to any subclass of members which has a separate interest and a

separate scheme to consider, no question of holding a separate meeting of such a subclass would at all survive. It is then observed that unless a separate and different type of Scheme of Compromise is offered to a subclass of a class of creditors or shareholders otherwise equally circumscribed by the class, no separate meeting of such subclass of the main class of members or creditors is required to be convened. In the present case, it may be true that Videocon International Limited had only one time transaction with the Petitioner Company. However, that would not qualify them to be treated as a separate class of creditors. For, the said intervenors have no conflicting interests vis-a-vis other unsecured creditors with whom they formed a wider class. Nothing is brought to my notice as to in what manner the interest of the said intervenor is in any way conflicting with the general interest of the unsecured creditors as a class. It necessarily follows that it is incomprehensible that the General Body of unsecured creditors acting as a class while considering the question of approval of the proposed scheme was likely to take a decision which would adversely affect the

commercial interest of the said intervenor (Videocon International Limited) as unsecured creditor. Viewed in this perspective, the subject objection is devoid of merits. Be that as it may, the proposed scheme provides for two options to the unsecured creditors as a class. Even the intervenor Videocon International Limited, unsecured creditor was to be covered by Option I. Obviously, therefore, there would be no occasion to offer a separate arrangement or compromise to the said intervenor. Accordingly, no separate meeting of the said intervenor as a subclass was required to be convened. Resultantly, the above said objection will have to be negated.

22. That takes me to the objection taken on behalf of the intervenors that the primary purpose of the proposed scheme is to absolve the guarantors and also the directors of the company including of criminal actions pending against them. It was argued that even if the Scheme was to be sanctioned, this Court in exercise of powers under Section 391 has no jurisdiction to interdict the criminal actions pending against the company and

its directors. In the first place, I would reject the argument that the primary purpose of the proposed scheme is only to absolve the guarantors and also the directors including of criminal action. On fair scrutiny of the scheme, it gives an impression that the Petitioner Company is making a genuine effort to restructure its debts so as to make the operation sustainable and also to keep the commitment and repayment of its debts to the creditors as per the proposed scheme. Because of approval of the scheme if the liability of the guarantors were to be extricated, that does not mean that scheme is intended only for that purpose. Whereas, as mentioned earlier, the Scheme proposes to keep the commitment of repayment of the debts though at restructured level. Be that as it may, the intervenors may be right to the extent that this Court has no jurisdiction to interdict the criminal actions pending against the Petitioner Company and its guarantors or directors. To that extent, the objection will have to be upheld relying on the exposition of our High Court as well as Delhi High Court. The consistent view taken in the cases reported in **1999 (1) LJ 288 (NOC) in**

Criminal Application No.2517 of 1998, State of Tamil Nadu (supra), D.K.Kapur (supra) Bombay Leasing Co.Pvt.Ltd. (supra) has been that Section 391(6) is inapplicable to criminal cases and this Court therefore cannot exercise powers under Section 391(6) to interdict those proceedings. In the present case, it will not be necessary to elaborate on this aspect, as in my view, the issue has already been concluded between the parties in the decision of Justice S.J.Vazifdar dated 4th/5th November 2004.

23. The intervenors have rightly relied on the decision of the Apex Court in the case of **Punjab National Bank Limited (supra)** to contend that the liability of the surety under Section 128 of the Contract Act is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. It is not necessary for me to go into the question whether in the present case, there is contract in favour of the sureties or guarantors to the contrary, so as to extricate them from the legal obligation arising out of Section 128 of the Contract Act of co-extensive liability

with the principal debtor. Suffice it to observe that the objection raised on behalf of intervenors that criminal actions cannot be interdicted by this Court will have to be accepted. To that extent, the proposed scheme cannot be approved by this Court.

24. That leaves me with the last objection as to whether the proposed scheme is unreasonable, unjust, unconscionable and unimplementable. The scope of enquiry in exercise of powers under Section 391 of the Act has been spelt out in catena of decisions, some of which are relied upon by the Counsel appearing for the parties. Reliance is placed on the decision of Gujarat High Court in the case of **Sidhpur Mills Company Ltd. (supra), Ipco Paper Mills Ltd. (supra), Official Liquidator vs. Dr.Shankar Vishnu Marathe & Ors. (supra), Miheer H.Mafatlal (supra)** and unreported decision of the Division Bench of this Court in the case of **Shree Niwas Girni Kamgar Kruti Samiti vs. Rangnath Basudev Somani & Ors. in Appeal No.521 of 2004 and connected cases decided on 21st March 2005.** The legal position as to the scope and ambit of

jurisdiction of the Company Court and the broad contours of such jurisdiction have been spelt out in the celebrated case of **Miheer H.Mafatlal (supra)** in Paragraph 28 which reads thus:

> "In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:
>
> 1. The sanctioning Court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with the that the requisite meetings as contemplated by Section 391(1)(a) have been held.
>
> 2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391, sub-section (2).
>
> 3. That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.
>
> 4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391, sub-section (1).

5. That all the requisite material contemplated by the proviso to sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bonafide and in good faith and were not coercing the minority in order to promote any interest adverse top that of the latter comprising of the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for

> whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.
>
> The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court’s jurisdiction."

25. Applying the above legal principles, it will have to be considered whether the proposed scheme is unacceptable and ought to be disapproved. Insofar as the first grievance that if the Petitioner company were to come out of BIFR and in the event of acceptance or approval of the proposed scheme, that would result in a prejudicial and unfair situation for the unsecured creditors such as the intervenors in whose favour decree has been passed by Court of competent jurisdiction whereunder they would be otherwise entitled to receive not only the principal amount but interest accrued thereon and to be accrued in future. In my opinion, this cannot be the basis for not approving the proposed scheme which has been voted in favour

by the requisite majority of the unsecured creditors. I have already taken the view that merely because the intervenors are possessed of decree passed by the Court, they cannot constitute separate class of unsecured creditors. Their interest is same as any other unsecured creditor, whose claim has not been adjudicated by Court of competent jurisdiction. If that is the legal position, the subject objection cannot be the basis to disapprove the proposed scheme. The Court on the other hand will have to keep in mind other overwhelming circumstances which would warrant approval of the scheme. In that, if the proposed scheme is to be approved, the Company will not only be revived, but would consolidate its financial position, which in turn, will result in augmenting business and exploiting the changed market situations thereby creating more job opportunities and also profiteer the shareholders and other lenders of the Company and resultantly subserve the larger public purpose. Viewed in this perspective, the Scheme cannot be disapproved on the above said objection.

26. It was then contended that there is no justification for waiver of interest; and on account of waiver of interest, the unsecured creditors such as the intervenors will suffer serious prejudice. Once again, this objection will have to be stated to be rejected. Decision of requisite majority of waiver of interest will have to be upheld, only when the purpose underlying the proposed scheme can be accomplished. The purpose is to restructure the debt value. That can be achieved only if the mounting interest on the principal dues payable by the company to its creditors was to be pegged down with commitment coming from the company to pay the outstanding principal amount as on the cutoff date in specified manner in anticipation of reasonable profits to be made due to revival of the company.

27. Viewed in this perspective, merely because the unsecured creditors were to suffer interest component, cannot be the basis to disapprove the proposed scheme, especially when the requisite majority of unsecured creditors have voted in favour of the scheme having taken informed decision

that they would suffer on account of waiver of interest component. Accordingly, even this objection will have to be turned down.

28. It was then contended that it is common ground that the networth of the Petitioner Company has eroded. If it is so, the scheme will be unviable and unimplementable. There is no substance in this objection. The projections as have been placed on record by the Petitioner company specifies the anticipated income of the Petitioner Company, which in turn, will be utilised for repayment of the dues of the Creditors. Along with the written submissions, Petitioner Company has placed on record payment schedules, status of unsecured creditors and secured creditors and projection chart. The figures provided in this chart would clearly reveal that if the Scheme operates smoothly as per the anticipated projections, there are good chances of company being revived and come out of the vicious cycle of debts. Viewed in this perspective, there is no substance in the above objection.

29. It is then argued that the Scheme is sham and bogus and unimplementable because repayment has been spread over in eight years with initial instalments in paltry sum and latter in substantial amounts. However, the scheme does not provide for the date of payment or the period for final payment. Whereas, the outstanding amount has been pegged down to the principal sum and cap has been provided which will result in rolling over of the oversubscribed outstanding dues and at the end of the 8th year, perhaps, even the principal amount will not be received by the unsecured creditors. Besides, the Scheme only provides for upward cap with no commitment for minimum payment. It is also argued that the scheme does not provide for any default clause in the event of non-payment of the outstanding principal amount as on the cutoff date. On the above arguments, it is contended that the scheme as presented is unreasonable, unjust, unconscionable and unimplementable. Indeed, the objections registered on behalf of intervenors, seem to be formidable ones. There are two options provided for the unsecured creditors. In the first option, the unsecured creditor would get the

payment in phase manner as referred to in the chart provided in the scheme. There is no commitment that the entire principal amount will be paid at least at the end of the 8th year, whereas, if the claim is oversubscribed, even that amount will be rolled over without final payment. Besides, no default clause has been provided in the Scheme. Insofar as Option No.II is concerned, there is substance in the argument that the same is more bogus than the first option, as it makes no provision for an assurance of repayment of the outstanding dues. Whereas, the unsecured creditor who opts under this option will be obliged to continue the business transactions with the Petitioner Company and in turn, receive only the future payments. In my opinion, instead of disapproving the proposed scheme in toto as presented, the situation can be salvaged by modifying the scheme in the following manner :

> Insofar as Option No.I is concerned, it provides for repayment in deferred manner in eight years' period. First year from sanction of scheme will be observed as

moratorium period. In the second year, the principal amount of 7.5% will be offered. Similarly, 7.5% of the principal amount will be offered in the third, fourth and fifth years. In the sixth year, 15%, whereas, in seventh year, 20% and in the 8th year 35% of the principal amount will be offered.

For approving the scheme, the Option No.I will have to make provision of repayment of principal outstanding as per the chart indicated below the said Option No.I (settlement), "with further condition" that the Petitioner Company will ensure that the entire principal amount will be paid by the end of 8th year from the date of sanction of the scheme. For the purpose of payment, the end of financial year i.e. 31st March of the concerned year will have to be reckoned. Insofar as the provision of cap of 1075 lakhs provided under Option No.I and the oversubscribed amount to be rolled over to

subsequent year is concerned, that provision will have to be adhered to up to the sixth year. In the seventh year, the Petitioner company will have to pay 20% of the principal outstanding as on the cutoff date as also additional 50% of the rolled over amount in the previous years. Similarly, in the 8th year, the Petitioner company will have to not only pay 35% of the principal outstanding but in addition, remaining 50% of the rolled over amount, so that, 100% payment of the principal amount is effected at the end of the 8th year.

Grievance was rightly made that no default clause is provided insofar as the scheme of unsecured creditors is concerned. To overcome that grievance, the present Scheme is approved "on condition" that non-payment of principal outstanding in terms of the percent mentioned against the respective years below Option No.I (settlement) and modified to the extent

mentioned earlier would constitute default. In case of default and/or delay in payment of monies payable by the Company under the scheme including any reimbursements, if not paid within the stipulated period, shall from the due date, carry interest of 9% per annum, compounded at monthly rest. Besides, if such amounts including interest as aforesaid, are not paid within thirty days, shall further carry additional interest by way of liquidated damages at the rate of 2% per annum in addition to 9% as above. If such provision is made in the proposed scheme, the same would adjust equities between the parties and the unsecured creditors will not be left with a situation of pegging down their principal outstanding and of not receiving even that amount in a reasonable time frame.

Insofar as Option No.II is concerned, it, by itself, appears to be unfair because

there is no commitment from the Petitioner Company of payment of principal outstanding as on the cutoff date. To overcome this fallacy, the scheme will have to be modified by providing for arrangement whereunder the Petitioner company will undertake to pay the surplus profit amount in the concerned year after paying the outgoings to secured creditors, statutory creditors and unsecured creditors in terms of the approved scheme. I am conscious of the fact that this course may conflict with the possibility of accelerated payment to be made by the Petitioner Company to the secured creditors. However, it is in that context, the outer limit has been provided of surplus amount out of the profits received by the company in the concerned year after paying the claim of the secured creditors, statutory creditors and unsecured creditors in terms of the scheme. Going by the projections given by the Petitioner Company, the Company is

bound to revive after some time and will be in a position to take the burden of paying the outstanding claim of unsecured creditors covered by Option No.II. In any case, on and from 9th year, it is expected that the Company will have no outstanding liability of unsecured creditors covered by Option No.I and profit amount will become available for disbursal to the unsecured creditors covered by Option No.II. The Scheme in relation to unsecured creditors is approved with the above modifications.

30. That takes me to the claim of the workers. The workers have rightly made grievance that although the scheme is not directed against them, it makes reference to aspects which will prejudice the interest of the workers. My attention has been rightly invited to clauses 5(b), 5(c), 5(f) and 5(h) of the Scheme. In this context, as mentioned earlier, the Petitioner Company has already filed affidavit assuring that none of the service conditions of the workmen will be changed in any

manner unless agreement is entered into between the company and its workers in future in that behalf. It is stated in the affidavit that as the scheme is confined to secured creditors, statutory creditors, unsecured creditors and shareholders, it is unnecessary to make reference in the scheme to any of the aspects which will have bearing on the rights of the workers in any manner.

ORDER

. Accordingly, the Petition is allowed on accepting the proposed scheme as presented, subject

to modifications referred to above in Para 29 above.

. In view of this order, nothing survives for consideration in the Company application, the same is disposed of.

. It is further ordered that the interim order of stay of criminal prosecution which was operating so far, shall continue for a period of twelve weeks from today to facilitate the

Petitioner to take recourse to such other remedy as may be permissible by law.

A.M.KHANWILKAR, J.